

THE CONSTITUTIONAL INIQUITY

INVOLVED IN ALL FORMS OF THE REGULATION OF PROSTITUTION.

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THE moral aspect of this question is undoubtedly the most important. There is, however, another aspect of it closely allied with the moral side, which is of scarcely less importance, namely, the constitutional and legal view. The late Professor Sheldon Amos, Professor of Jurisprudence in the London University, exposed this side of the subject fully in his book, "Laws for the Regulation of Vice" (Stevens and Sons, London). A great legal writer, Mittermayer, says, "It is more and more acknowledged that the penal code of a nation is the keystone of that nation's public law." Another great authority on law, Montesquieu, says, "It is upon the excellence of the criminal laws chiefly that the liberty of the subject depends; and these words, 'liberty of the subject,' what do they not include?"

Now the system of State regulation of vice with which we are dealing is everywhere, and in whatever name embodied, a piece of penal legislation of the most severe and repressive nature. By these regulations is erected an arbitrary tribunal before which are tried certain arbitrarily-created offences. The inventors of this system of regulation have invented new crimes, and attached to them new and terrible penalties, till recently unheard of in our country; and in the whole treatment of these newly-invented crimes they have introduced an element of dangerous laxity into the criminal code of England, and of every country in which there exists a just criminal code, which threatens the stability of justice throughout the whole of jurisprudence.

It may be well to consider for a moment, carefully, the meaning of the word "constitutional;" the more so, as people

are not even yet awake to the tremendous issues at stake in the case before us. The controversy throughout Europe and in our own colonies may be considered as a question of constitutional and legal rights. A profound thinker and writer, Lieber, enumerates the points of what we call "constitutional law," which characterise a fair, just and sound penal trial, and if we compare this picture point by point with the principles and practice of the regulations we oppose, we shall find that these regulations are wanting in every one of the characteristics of a fair, just and sound penal trial. The following are the points:—

- No intimidation before the trial ;
- No attempt by artifice to induce the prisoner to confess, or to incriminate himself or herself ;
- Every contrivance which protects the citizen against being placed too easily in the position of an accused person ;
- The fullest possible realisation of the principle that every one is to be held innocent until proved to be guilty ;
- A total discarding of the principle that the more heinous the imputed crime, the less ought to be the protection of the prisoner ; but, on the contrary, the adoption of the reverse ;
- A distinct indictment, and the acquaintance of the prisoner with the indictment a sufficiently long time before the trial to give him time to prepare his defence ;
- The accusative process, with publicity, and not a process in writing ;
- Counsel, or defence, for the prisoner ;
- A distinct theory, or law, of evidence, and no mere hearsay testimony ;
- Verdict upon evidence alone ;
- A punishment in proportion to the offence, and in accordance with common sense and justice ;
- Especially, no punishment which must make a prisoner worse than he or she was before they fell into the hands of the Government ;
- The accusative as opposed to the inquisitorial procedure, carried out with good faith, requires that the accusation shall not be made by the Executive, but upon information by whomsoever made, through an act, which itself includes a guarantee against frivolous and oppressive accusations ; for be it remembered that arrest and trial themselves, though followed by acquittal, are a hardship.

Now the English Constitution during the present century at any rate has provided all these conditions of a just penal code, except while the Contagious Diseases Acts disgraced our Statute Book.

The above Acts, and all similar laws and regulations, are utterly and entirely opposed to the above-stated principles; they are a deadly blow at the very heart of these principles, and they are not worthy of the name of laws. It behoves every citizen who rules his life by the commands of the Great and Eternal Law-Giver to oppose himself to these base laws, these bastards amongst the legitimate laws of our country. These Acts and all similar regulations of prostitution, allow, and enforce, the accused to incriminate herself. They sanction her being intimidated or persuaded to write herself down as guilty before she has had any kind of trial whatever. (This was done in England by means of what was ironically called a "voluntary submission.") They hold the accused to be guilty until she can prove herself innocent (and that in a matter in which it is impossible, except by some very dreadful alternative, for a woman to prove her innocence.) They condemn and punish on suspicion merely (on the suspicion of the police only) and no positive proof is required. They grant no open trial. They imprison arbitrarily, and again and again. They require no witnesses other than the suspecting and accusing Government-paid spy-police. They allow the accusation to be made by the Executive. They require from the Executive no reasons whatever for the suspicion and the accusation. They try the suspected and accused persons not in open court, but in a secret court. Finally, they make redress all but impossible for persons who have been falsely accused and cruelly outraged.

Such is a general outline of all systems of regulation and protection of prostitution.

Such laws and regulations eat like a cancer not only into the morality of the nation which allows them, but into its political life. If we once admit the principle that our sacred

legal and personal rights may be surrendered, even in the case of the most despised members of the community, then our boasted jurisprudence totters to its downfall, and our freedom will soon become a thing of the past.

The outrages practised upon the persons of women periodically under all these systems is confessed by all to be the central and essential feature of them, the *sine qua non* of the whole fabric. Concerning the illegality of this act of enforced personal examination, considered from the point of view of the English law, we consulted some twenty years ago an able jurist, Sir Hardinge Giffard, now Lord Halsbury, the late Lord Chancellor. We asked of him a distinct legal opinion, which, coming from such a source, must be authoritative. Lord Halsbury was then not in sympathy with our agitation against this system, but he was a just man and a learned jurist. The following is his opinion, given in writing :—

"I entertain no doubt that the order for examination (in the cases cited) is illegal. No trace of the existence of any such power as this order assumes is to be found in any book of authority. *Such an order is contrary to the whole spirit and principle of our law.* I am of opinion that the Coroner's power is simply to detain by his warrant all suspected persons safe in custody. As ancillary to that purpose of detaining in safe custody, whatever is reasonably necessary for that detention would be justified, and also such an examination of the person as would prevent the accused person escaping, either by self destruction, by prison breaking, or by corrupting the gaolers ; and for that reason, as a matter of prison regulation, it is probably lawful, and even apart from Acts of Parliament giving any such power, to search for offensive weapons, files, tools, or the like, or money, and while the accused is in custody, to keep such articles from him.

"The bodily examination, however, is a *search of the person for evidence*, and seems to me to be wholly contrary to law.

"I need hardly say that our law considers all persons innocent till they are proved to be guilty ; and, further, that the law invests *the person of everyone of the Queen's subjects with its protection against the merest touch.*—(Signed) HARDINGE GIFFARD, The Temple, London."